Morgan's Holiday Markets, Inc. *and* United Food and Commercial Workers, Local 588, United Food and Commercial Workers International Union, AFL–CIO. Case 20–CA–25176

April 5, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On April 4, 1997, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a brief in support, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Morgan's Holiday Markets, Inc., Cottonwood, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Jonathan J. Seagle, Esq., for the General Counsel.

Anne E. Libbin, Esq. and *Ann E. Polus, Esq.*on the brief *(Pillsbury, Madison & Sutro),* San Francisco, California, for the Respondent.

Andrew J. Kahn, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Charging Party.

[1] The Board has today affirmed the judge's dismissal based on Sec. 10(b) of the allegations in Cases 20–CA–23314 and 20–CA–25025 which were bifurcated from this case by the judge by order of November 29, 1995, 333 NLRB No. 92 (2001)

Member Hurtgen agrees with the judge that the Respondent violated the Act when it failed to make contributions to the union trust fund for the period of December 1992 through January 1993. Thus, even assuming arguendo that a good-faith impasse in bargaining had been reached in October 1992, Member Hurtgen finds that the Respondent's conduct was unlawful. The Respondent's proposal was to have its own benefit plan in lieu of the Union's benefit plan. Although this proposal had two parts (i.e., discontinue the union plan and institute a new plan), it was essentially one proposal. In these circumstances, the Respondent could not split the one proposal into the two parts, i.e., it could not discontinue the union plan and *not* institute its own plan. Respondent followed this course for December 1992 and January 1993. (It did not institute its own plan until February 1, 1993.) In finding that this conduct was unlawful, Member Hurtgen emphasizes that he is not saying that all "piece meal" implementations are unlawful. Thus, for example, the Respondent might well have been privileged to implement its benefit plan proposal (both parts), even though its final offer covered other subjects as well.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in San Francisco, California, on September 16, 1996. United Food & Commercial Workers, Local 588, United Food & Commercial Workers International Union, AFL–CIO (the Union) filed the charge in this case on February 17 and amended it on March 29, 1993. A consolidated complaint, issued December 16, 1994, in Cases 20–CA–23314, 20–CA–25025, and 20–CA–25176, alleged that Morgan's Holiday Markets, Inc. (the Respondent), and North State Grocery, Inc. (North State), had violated Section 8(a)(1), (3), and (5) of the Act. Following extensive hearing in 1995, on November 29, 1995, I issued an order severing Case 20–CA–25176 from Cases 20–CA–23314 and 20–CA–25025. On December 1, 1995, I issued a decision dismissing the allegations in Cases 20–CA–23314 and 20–CA–25025, because those allegations were time barred. That decision is currently pending before the Board on exceptions of counsel for the General Counsel and for the Union.

By order of May 14, 1996, I granted leave to file an amended complaint in the instant case. As amended, the complaint alleges that about February 1, 1993, the Respondent implemented various changes in the terms and conditions of employment of employees represented by the Union without the consent of the Union and without having reached a good-faith impasse in bargaining in violation of Section 8(a)(1) and (5) of the Act. In addition, the amended complaint alleges that on or about February 1, 1993, the Respondent failed to make contractually required contributions for hours worked during the months of December 1992 and January 1993 on behalf of unit employees to various trust funds administered by the Retail Clerks and Employers Benefit Plans of Northern California (the Plans) without the consent of the Union in violation of Section 8(a)(1) and (5).

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with offices in Cottonwood, California, and facilities at various locations in Northern California, has been engaged in the operation of retail grocery stores. During the 12-month period ending December 31, 1993, the Respondent sold goods valued in excess of $500,000 and purchased goods valued in excess of $5000 which originated from suppliers located outside the State of California. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Since about April 1, 1984, the Union has been the designated collective-bargaining representative of the Respondent's retail food employees, excluding meat department employees and

supervisors, at its retail food stores in Northern California.[1] most recent agreement was effective by its terms from July 1, 1989, to and including June 30, 1992. The agreement required the Respondent to make contributions to trust funds on behalf of employees for pension, health and welfare, vacation, and individual accounts. Contributions were due to the Plans by day 20 of the month following the month in which the qualifying hours were worked by unit employees.

On June 29, 1992, the first negotiating session for a successor contract was held. Discussions were contentious. The Respondent presented its economic situation as dire and requested relief from the standard agreement while the Union claimed that the Respondent had been given relief in past years and, nevertheless, opened nonunion stores as North State stores to avoid the contract terms. The Union took the position that North State stores were included in the bargaining unit and that North State was an alter ego of the Respondent. In fact, on June 4, 1992, the Funds filed suit in Federal district court against the Respondent and North State alleging that the two were alter egos.

On July 2, 1992, the parties signed an extension agreement continuing the terms of the last contract until August 15, 1992. After that date, the Respondent continued all contributions to the Plans through November 1992. Although the Respondent reported the hours worked by covered employees during December 1992 and January 1993, it did not make contributions.

Meanwhile, negotiations continued on August 6 and 18, September 21, and October 5, 1992. During all of these meetings, the Respondent maintained its position that it could not pay the benefits provided in the standard agreement and the Union maintained that it would consider no alternative but that agreement. At the conclusion of the last of these meetings, the Respondent's negotiator stated that the parties were at impasse and offered to submit the Respondent's final proposal. No further meetings were scheduled. By letter of October 8, 1992, the Respondent delivered its final offer which contained medical coverage through a private insurance carrier and retirement benefits through a 401(k) plan. The final offer provided for no contributions to the Funds. The Respondent advised the Union that the offer would be, ``open for questions, negotiation and acceptance until 11:59 p.m., October 18, 1992.'' Further, the Respondent asserted that it, ``expressly reserv[ed] its right to implement all or any applicable portions of the [proposal] should acceptance not occur by the above set forth date.'' The letter concluded with an invitation to the Union to contact the Respondent to meet and discuss the final offer.

On October 13, 1992, the Plans advised the Respondent that a funded vacation reimbursement in the amount of $9006.04 would be withheld pending resolution of the alter ego dispute. On October 14, 1992, the Respondent filed a motion to stay the Federal court action. A copy of the motion was hand-delivered to counsel for the Plans (who is also counsel for the Union) on that date. By letter of that same date, the Union's chief negotiator requested further negotiations and stated an intent to be flexible. He specifically disagreed with the Respondent's claim that the parties were at impasse. By letter of October 15, 1992, the Union requested information regarding the Respondent's medical insurance and 401(k) proposals. The Respondent provided this information on October 19, 1992. Thereafter, the parties met on October 23, 1992, and discussed the Respondent's medical insurance and 401(k) proposals and the Union requested further information, which was subsequently provided.

In November 1992 the Respondent's chief negotiator met with the Union's president. The possibility of a capped health and welfare plan was discussed but no specific proposal was exchanged. At a bargaining session on November 12, 1992, the Union rejected the idea of capping health and welfare and rejected the 401(k) proposal. The last negotiating session was held on December 17, 1992. No agreement on any terms, with the exception of two minor issues, had been reached. The parties agreed that it was futile to continue meeting. On January 4, 1993, the Respondent submitted its last, best, and final offer to the Union. Similar to the proposal of October 8, 1992, this proposal provided for the Respondent's medical insurance and a 401(k) and no contributions to the Plans. The Respondent understood that a membership ratification vote would be conducted by the Union in January 1993. However, no such vote occurred.

By letter of January 29, 1993, the Respondent announced that it would implement its final offer effective February 1, 1993. Health and welfare coverage was provided to unit employees through the Plans until February 28, 1993.

B. Analysis

February 1, 1993 Unilateral Changes

Counsel for the General Counsel and the Union assert that on February 1, 1993, the Respondent implemented various changes in the terms and conditions of employment of unit employees without having reached a good-faith impasse. As a basis for lack of good-faith impasse, counsel relied on the unfair labor practice allegations contained in the consolidated complaint in Cases 20–CA–23314 and 20–CA–25025. Because I dismissed those allegations as time barred, I am unable to find lack of a good-faith impasse on that basis.

Counsel for the General Counsel suggests that this case be held in abeyance pending the Board's decision on exceptions in Cases 20–CA–23314 and 20–CA–25025 and asserts that should my dismissal be reversed, evidence would be presented which would establish that the unfair labor practices committed by the Respondent and North State precluded a good-faith impasse in negotiations[2] have decided not to hold this case in abeyance for

[1] The unit consists of all employees working in the Respondent's retail food stores within the geographical jurisdiction of the Union covering Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada; Placer Plumas, Sacramento, San Joaquin, Sierra, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tuolumne, Yolo, and Yuba Counties, California; Southwestern Washoe County, Nevada (Tahoe Basin), and Northwestern Douglas County, Nevada (Tahoe Basin), excluding meat department employees and supervisors within the meaning of the National Labor Relations Act (the Act).

[2] The parties voluntarily bifurcated litigation of the 10(b) issue in Case 20–CA–23314 and 20–CA–25025. Because I dismissed the alle-

any further time. Should the Board reverse my dismissal in Cases 20–CA–23314 and 20–CA–25025, the parties may address the appropriateness of remand of this case to me with those cases.

December 1992 and January 1993 Plan Contributions

There is no dispute that the December 1992 and January 1993 plan contributions were not made and there is no dispute that, absent good-faith impasse and subsequent unilateral implementation of other terms and conditions reasonably contained in a final offer, the Respondent had a postexpiration obligation to continue the contributions.

The Respondent argues that impasse existed on October 5, 1992, and that this impasse was not broken by the Union's declared flexibility of October 14, 1992, nor by the Union's stalling tactics in requesting more meetings and information. The Respondent characterizes these actions as a ``smokescreen'' and notes that there was no change in the Union's bargaining position at any subsequent meetings. Accordingly, based on the October 5, 1992 impasse, the Respondent argues that it no longer had an obligation to make contributions to the Funds.

Assuming that an impasse existed on October 5, 1992, and was not broken by subsequent actions of the Union, the Respondent's argument nevertheless fails. The Respondent's letter of October 9, 1992, specifically held open the offer until October 18, 1992, and reserved the right to implement following that date. No notice of implementation of that offer or any part of it was subsequently given. Rather, the Respondent met with the Union several more times. Moreover, the Respondent's assertion that it was free to implement its final offer based on the October 5, 1992 impasse fails because there is no evidence of implementation of the Respondent's medical coverage or the 401(k) plan. There is simply evidence of failure to make contributions to the Plans. For these reasons, I reject the Respondent's argument that the October 5, 1992 impasse privileged cessation of contributions.

The Respondent also argues that the Union's bad-faith excuses its duty to bargain to impasse prior to implementing a unilateral change. Although the Union may have insisted on its standard agreement, I do not find that its actions avoided or delayed bargaining or prevented fruitful negotiations. The Union was not required to agree to the Respondent's proposals. Neither party moved from its initial position regarding the economic concessions. Moreover, I do not find that the Union's October 14 request for further meetings, even if prompted by fear that the alter ego litigation might be stayed, was made in bad faith. Many external factors influence bargaining strategies. Moreover, the Respondent specifically invited further meetings prior to October 18, 1992.

Because I do not find that implementation of any final offer occurred until February 1, 1993, I reject the Respondent's argument that, at most, it is liable only for qualifying hours from December 1 through 17, 1992.

gations based on Sec. 10(b), the merits of the allegations were not litigated.

CONCLUSIONS OF LAW

1. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees working in the Respondent's retail food stores within the geographical jurisdiction of the Union covering Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Nevada, Placer Plumas, Sacramento, San Joaquin, Sierra, Stanislaus, Sutter, Shasta, Siskiyou, Tehama, Trinity, Tuolumne, Yolo, and Yuba Counties, California, Southwestern Washoe County, Nevada (Tahoe Basin), and Northwestern Douglas County, Nevada (Tahoe Basin), excluding meat department employees and supervisors within the meaning of the National Labor Relations Act, as amended.

2. At all material times, the Union has been the designated exclusive collective-bargaining representative of unit employees and has been recognized as such representative by the Respondent. Such recognition has been embodied in a series of collective-bargaining agreements, the most recent of which was effective by its terms for the period July 1, 1989, to June 30, 1992.

3. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of unit employees.

4. Pursuant to the terms of its expired collective-bargaining agreement, the Respondent was obligated to make contributions for hours worked during December 1992 and January 1993 on behalf of unit employees to the following trust funds administered by the Retail Clerks and Employers Benefit Plans of Northern California: Food Pension Plan, Valley Clerks Food Health and Welfare Fund, the Individual Account Plan, and Fund-A-Vacation Plan.

5. By failure to make contributions for hours worked during December 1992 and January 1993 on behalf of unit employees to the above trust funds without the consent of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (5) by failing to make contractually required contributions to the Plans, the Respondent shall be ordered to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir.

1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Morgan's Holiday Markets, Inc., Cottonwood, California, its officers, agents, successors, and assigns, shall cease and desist from failure to make contributions for hours worked during December 1992 and January 1993 on behalf of unit employees to Food Pension Plan, Valley Clerks Food Health and Welfare Fund, the Individual Account Plan, and Fund-A-Vacation Plan administered by the Retail Clerks and Employers Benefit Plans of Northern California without the consent of the Union or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

1. Make employees whole by making the contractually required contributions to the Plans for December 1992 and January 1993 and by reimbursing employees for any expenses ensuing from its failure to make the required contributions as set forth in the Remedy section of this decision.

2. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

3. Within 14 days after service by the Region, post at its facility in Cottonwood, California, and at its retail grocery stores at which the 1989–1992 contract applied, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 1993.

4. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Pursuant to the terms of our 1989–1992 collective-bargaining agreement with United Food & Commercial Workers, Local 588, United Food & Commercial Workers International Union, AFL–CIO, we were obligated to make contributions for hours worked during December 1992 and January 1993 on behalf of bargaining unit employees to the following trust funds administered by the Retail Clerks and Employers Benefit Plans of Northern California: Food Pension Plan, Valley Clerks Food Health and Welfare Fund, the Individual Account Plan, and Fund-A-Vacation Plan.

WE WILL NOT fail to make contributions for hours worked during December 1992 and January 1993 on behalf of bargaining unit employees to the above Plans without the consent of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make bargaining unit employees whole by making the contractually required contributions to the Plans for December 1992 and January 1993 and by reimbursing employees for any expenses ensuing from our failure to make the required contributions.

MORGAN'S HOLIDAY MARKETS, INC.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."